IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 23, 2006 Session

BILL YOUNG and wife, MARY YOUNG v. RAC EXPRESS, INC., WILLIAM HAMBLIN & TOMMY HEATWOLE (a/k/a TOMMY HEATWOLD, JR.

Direct Appeal from the Chancery Court for Campbell County
No. 03-213 Hon. Billy Joe White, Chancellor

No. E2005-01165-COA-R3-CV - FILED JUNE 21, 2006

In this declaratory judgment action, the Trial Court invalidated a judgment lien on plaintiffs' property. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Stanley F. Roden, Knoxville, Tennessee, for appellant.

Johnny V. Dunaway, Lafollette, Tennessee, for appellees.

OPINION

Plaintiffs brought this action against RAC Express, Inc., William Hamblin and Tommy Heatwole (a/k/a Tommy Heatwold, Jr.), alleging plaintiffs owned certain real property in Campbell County which they acquired via warranty deed from Hamblin on April 25, 2003, and which Hamblin had acquired from Heatwold via warranty deed on August 15, 2002. Plaintiffs further alleged that they had tried to obtain a loan using the real property as collateral, and that a title search revealed there was a judgment lien outstanding in favor of RAC Express, Inc., against Heatwold. Plaintiffs alleged that the judgment was entered on August 6, 2000, in the amount of $14,000.00, and was recorded as a lien against real property owned by Heatwold on February 21, 2001. Further, that

the judgment lien was invalid and had not been properly perfected, and the property was not subject to same. Plaintiffs asked for a declaratory judgment invalidating the judgment lien and removing any cloud on their title.

RAC Express, Inc., Answered, and admitted that it had filed the subject judgment lien, and that it was a valid lien on property owned by Tommy Heatwold at the time of its recording.

Plaintiffs were granted default judgments against Heatwole and Hamblin. Plaintiffs then moved to amend their Complaint, to allege that the judgment lien filed by RAC indicated that it was against Tommy Heatwold, rather than Heatwole, and also that it did not designate Jr. or Sr.

At trial, the Court heard arguments of counsel, and allowed RAC to make an offer of proof. Bill Rutherford testified that he was formerly Assistant Chief of Police in Jellico, and that he met Heatwole then. Rutherford testified he knew Heatwole and his son, who went by Tommy Heatwole, Jr. Rutherford testified the father simply went by Tommy Heatwole, with no designation of Sr. Rutherford testified that he had served process on Heatwole, and in that instance, his name was spelled Heatwal.

Richard Allan Cochran testified, and stated that he entered into the contract with Heatwole, could definitely recognize him, and had seen him before court going into an attorney's office across the street. Cochran testified that the contract was with Michael Wayne Bowling, and that Heatwole was a co-signer.

The Court made its ruling on April 21, 2005, stating that it had reviewed the record and heard arguments of counsel, and found that the judgment lien at issue would be declared to be of no effect against the real property owned by plaintiffs, which was formerly owned by Tommy Heatwole, Jr. The Court found that RAC held a judgment lien against Tommy Heatwold, and that plaintiffs were innocent purchasers of the property. The Court observed that judgment liens were creatures of statute and as such, were to be strictly construed and to be limited to parties properly identified. The Court concluded that RAC had not shown that Heatwole was properly identified and his name correctly spelled, and plaintiffs were entitled to relief due to the incorrect spelling.

The sole issue on appeal is whether an incorrectly spelled name on a judgment lien encumbers the property of the judgment debtor?

RAC argues that plaintiffs were put on constructive notice of the lien against Heatwole's property by the recordation of the judgment against "Heatwold", regardless of the misspelling of his last name. RAC argues that this is shown by the fact that when a title search was performed in conjunction with the construction loan process, the lien was revealed. It further argues that the doctrine of *idem sonans* (Latin for "sounds like") should apply, such that if the two names are substantially similar, there should be no question of notice. RAC argues that the plaintiffs were at least on inquiry notice, which has been defined as "knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate

and ascertain as to the ultimate facts." *Blevins v. Johnson County*, 746 S.W.2d 678 (Tenn. 1988).

As this Court explained in *ATS, Inc. v. Kent*, 27 S.W.3d 923, 924 (Tenn. Ct. App. 1988):

> The law in Tennessee with respect to the manner in which judgment liens are obtained is governed by statute. See Tenn. Code Ann. §25-5-101 to -109 (1980 & Supp. 1997). A judgment obtained in Tennessee becomes a lien on the debtor's real property when the judgment is recorded in the register's office of the county where the land is located. See Tenn. Code Ann. §25-5-101(b) (Supp. 1997). Upon proper recordation, the judgment also becomes effective against any person having or later acquiring an interest in the debtor's real property regardless of whether that person was a party to the action resulting in the judgment. See Tenn. Code Ann. §25-5-101 (c) (Supp. 1997); Tenn. Code Ann. § 66-24-119 (1993).

A judgment does not create a lien unless and until it is properly recorded according to the statute. *Id.; see also Kelley v. McLemore*, 560 S.W.2d 74 (Tenn. Ct. App. 1977). Moreover, judgment liens are creatures of statute and did not exist at common law. Hence, the statutory requirements are strictly construed, and the lien is "lost if the statutory provisions are not strictly complied with." *Weaver v. Smith*, 50 S.W.771 (Tenn. 1899); *Massachusetts Mut. Life Ins. Co. v. Taylor Implement & Vehicle Co.*, 195 S.W. 762 (Tenn. 1917).

Tenn. Code Ann. § 25-5-102 provides:

> A judgment or decree shall not bind the equitable interest of the debtor in real estate or other property until a memorandum or abstract of the judgment or decree, stating the amount and date thereof, with the **names of the parties** is certified by the clerk and registered in the register's office of the county where the real estate is situated.

(Emphasis added). Similarly, Tenn. Code Ann. § 25-5-108 provides:

> (a) The abstract of the judgment or decree shall show briefly the **names of the parties, plaintiff and defendant**, the name of the court, and number of the case, and the amount, and date of judgment or decree, and the **names of all parties against whom the judgment or decree is taken.**

(Emphasis added).

There is no dispute that the Judgment registered showed the name of "Tommy Heatwold", rather than Tommy Heatwole, Jr., who was plaintiffs' predecessor-in-title. As such, the judgment would not be in the plaintiffs' chain of title, and plaintiffs would not be charged with constructive notice.

RAC urges this Court to apply the doctrine of *idem sonans*, and to hold that "Heatwole" and "Heatwold" are similar enough that the plaintiffs would be charged with constructive notice. While we have been cited no Tennessee authorities on point, other jurisdictions have refused to apply this doctrine in similar cases involving questions of constructive notice of liens. For example, in the case of *Orr v. Byers*, 198 Cal. App. 3d 666 (4th Dist. 1988), a judgment creditor sued the debtor and the purchaser of the debtor's property, but the abstract of judgment which the creditor recorded mistakenly spelled the debtor's last name as Elliot or Eliot, rather than Elliott. The court held the purchaser of Elliott's property did not have constructive notice of the lien due to the misspelling, and that the doctrine of *idem sonans* would not apply. *Id.* The court further held that the burden of having the lien recorded correctly should be on the creditor, rather than requiring those searching titles to consider every possible spelling/misspelling of a name. *Id.*

The same result obtained in the Supreme Court of New Hampshire in *Brady v. Mullen*, 649 A.2d 47 (N. H. 1994), wherein the creditor mistakenly recorded a lien against Welsh rather than Welch. The court said that idem sonans would not apply, because the "key" to proper notice in the context of liens was the proper spelling of the defendant's name. *Id.* Similarly, in *National Packaging Corp. v. Belmont*, 547 N.E.2d 373 (Ohio Ct. App. 1988), the Court of Appeals of Ohio ruled that *idem sonans* would not apply in an analogous situation (where the debtor's name was spelled Bolen rather than Bolan), and that to rule otherwise would "tax all land abstractors beyond reasonable limits and require them to be poets, phonetic linguists, or multilingual specialists. The additional time necessary to examine name indexes under such a stringent doctrine would make the examinations financially prohibitive." *Accord; Waicker v. Banegura*, 745 A.2d 419 (Md. Ct. App. 2000); *Jones v. Parker*, 258 A.2d 26 (N. J. Super. 1969); *Coco v. Ranalletta*, 189 Misc. 2d 535 (N. Y. 2001); and *Breyer v. Gale*, 207 N.W. 46 (N. D. 1925).

The foregoing body of case law from other states dealing with this subject is persuasive, and comports with the precedent from our State which dictates that the requirements of the judgment lien statutes must be strictly complied with. The burden is on the judgment creditor to ensure the judgment lien is properly recorded against the debtor with his name spelled correctly.

RAC argues that even if *idem sonans* is not applicable here, the concept of inquiry notice as discussed by the Supreme Court in *Blevins v. Johnson County*, 746 S.W.2d 678 (Tenn. 1988), would dictate that plaintiffs be charged with notice. RAC asserts that the misspelling of the name by one letter would somehow put the purchasers on inquiry notice. As the authorities establish, the misspelling renders the lien ineffective and outside the chain of title, and there is nothing to put the plaintiffs on "inquiry" notice. The fact that the lien was discovered at some point later (by what means we do not know) does not change the fact the lien was improperly recorded. There is no evidence in the record that this was the first time a title search was done, as RAC asserts. If the lien is ineffective to give constructive notice, it is simply ineffective, period.

Moreover, the concept of inquiry notice involves a variation of actual notice, such as in the *Blevins* case, where the plaintiff was aware of an impending road project and the fact that the State had negotiated regarding same with plaintiff's predecessors-in-title. *Id*. Plaintiff purchased

the land having talked to the State's representative regarding the road project and having also discussed with him the fact that the State had compensated his predecessors. *Id.* Plaintiff had the deed from the predecessors to the State in his chain of title, and he had an attorney representing him when he made the transaction. *Id.* Thus, the Court stated that "Plaintiff could have and should have discovered the extent to which the highway project was to have affected the property. Plaintiff failed to undertake a diligent investigation, despite having sufficient notice that the highway project was planned along the frontage of the property he purchased." *Id.* at 686-687.

In this case, there are no facts in the record from which the plaintiffs could have or should have been aware of this lien. There was no testimony that plaintiffs had any notice whatsoever there was a lien outstanding against the property, no actual notice, no constructive notice as the lien was improperly recorded, and nothing to put them on inquiry notice. The Trial Court correctly ruled that the plaintiffs were innocent purchasers without notice.

For the foregoing reasons, we affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to RAC Express, Inc.

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HERSCHEL PICKENS FRANKS, P.J.